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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4618

OSCAR P. BATTLE, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Oscar P. Battle, appeals through counsel an October 30, 2015, Board of Veterans' Appeals (Board) decision that denied him service connection for a gastrointestinal (GI) disorder, to include diverticulitis. Record (R.) at 2-10. The appellant argues that the Board erred when it relied on an inadequate VA examination. Appellant's Brief at 5-10. For the following reasons, the Court will vacate the Board's October 2015 decision and remand the matter for further adjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*,

507 U.S. 511, 514 (1993); *see Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant is a veteran who served honorably in the U.S. Air Force from July 1966 until July 1970, as a radio relay equipment repairman. R. at 167 (DD Form 214). In May 1968, a physician diagnosed the appellant with *Giardia Lamblia*.¹ R. at 200. In June 1970, the appellant complained of stomach issues lasting more than two weeks. R. at 178. The doctor scheduled the appellant for a GI series and instructed him to take Metamucil and drink water. R. at 178. The appellant made similar complaints of stomach issues on two later occasions. R. at 169-217.

In June 1997, the appellant was hospitalized and treated for diverticulosis. R. at 367-71. In May 2011, he filed for benefits based on service connection for his stomach condition.

In June 2011, the appellant underwent a VA examination of his stomach, duodenum, and peritoneal. R. at 341-50. The examiner opined that the appellant did not have a diagnosis of a stomach condition and, therefore, the appellant's stomach condition was not caused by service. R. at 348. The examiner's rationale is merely a recitation of the chronology of the appellant's stomach condition.

In October 2015, the Board denied the appellant's claim. The Board relied on the June 2011 examination, which stated that the appellant did not have a diagnosis of a stomach condition. R. at 8. The Board also noted that the 2011 examiner stated that his in-service complaints were related to indigestion—not a stomach disorder. R. at 8. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for its reliance on the June 2011 VA examination. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (detailing that, in each of its decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court). The Board found that the examiner stated

that the Veteran did not have a diagnosis of a stomach issue or condition, and indicated that his claimed "stomach disorder" was not due to service because his diagnosis was of diverticulosis and his in-service complaints were related to indigestion. The examiner noted that the Veteran was initially diagnosed with

¹ "Giardia" is "genus of usually nonpathogenic, flagellate intestinal protozoa of the order Diplomonadida, phylum Parabasalia, parasitic in vertebrates." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 773 (32d ed. 2012). "Giardia Lamblia" is a species of this parasite that can affect humans. *Id.*

functional bowel disease, but later found to have indigestion and hiatal hernia symptoms associated with heartburn. The examiner noted that the service treatment record did not mention diverticulosis.

R. at 8. The Board's reliance on this examination was in error in multiple regards. First, the examiner based her negative nexus opinion on an inaccurate factual premise—that the appellant did not have a diagnosis of a stomach condition in service. *See Reonal v. Brown*, 5 Vet.App 458, 460 (1993) (holding that a medical opinion based on an inaccurate factual premise has no probative value). The examiner herself acknowledged that the appellant was diagnosed in service with functional bowel disease and with the parasite, *Giardia Lamblia*. R. at 348.

Second, the Board's finding that the examiner attributed the appellant's stomach and bowel symptoms to indigestion is simply not true. The examiner merely explained that the appellant reported problems with indigestion on his May 1970 separation examination, and also noted that he was not treated, and there were no complications or sequela in service for indigestion prior to his separation examination. R. at 348-49. The examiner then noted that in June 1970, after the appellant's separation examination but before his discharge from active duty, he sought treatment for stomach pains only and was diagnosed with functional bowel disease. R. at 349. Five days later, the appellant sought treatment for *chest* and stomach pain and was diagnosed at that time with indigestion. R. at 349. There is no evidence in the record, however, that his diagnosis was changed to functional bowel disease—only that the appellant was also diagnosed with indigestion.

Third, the Court also concludes that it is unclear how the examiner based her negative nexus opinion on a lack of an in-service diagnosis of diverticulosis. R. at 348-49. The record reflects that the appellant has only ever been diagnosed with this condition after he underwent either a colonoscopy or an esophagastroendoscopy. *See* R. at 348-49, 367-81. However, the record is silent for the appellant undergoing either of these procedures in service. Thus, it does not appear that a lack of in-service diagnosis of diverticulosis is negative evidence against the appellant's claim, but rather that the appellant was never tested for this condition in service. Remand is required for the Board to provide an adequate statement of reasons or bases for its reliance on this examination or provide the appellant a new examination that adequately considers the appellant's entitlement to service connection for his claimed stomach condition. *See Gilbert, supra*.

Because the Court is remanding the matter, it will not address the appellant's remaining

arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1988). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also* Hayburn's Case, 2. U.S. (2 Dall.) at 409, 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reasons, the October 30, 2015, Board decision is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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